authorities of the State of Wisconsin. (R. 10) With his request, the prosecuting attorney forwarded a "'duly certified copy of the original affidavit'' made by Officer Dabner together with a copy of the warrant issued thereon.

The affidavit and warrant were certified by Edwin McClure, the Clerk of Criminal Court, and his signature on the certification was attested to by the Honorable Saul I. Rabb, presiding judge of that court. Judge Rabb's signature was, in turn, attested to by Edwin McClure. (R. 10-12) The Governor of Indiana then issued his requisition to the Governor of Wisconsin requesting that the respondent be arrested and extradited to Indiana. (R. 8) The Governor of Wisconsin thereafter issued his warrant for the arrest of respondent. (R. 7)

The respondent obtained a Writ of Habeas Corpus from the County Court of Dodge County, Wisconsin, and a hearing was had on said Writ on December 15, 1964. Orlie C. Uttech, Sheriff of Dodge County, filed a return Writ of Habeas Corpus setting up the Governor's warrant and supporting papers thereto supplied by the Indiana authorities as justification for holding Isaac Foster. (R. 6) After a hearing, the County Court for Dodge County, Wisconsin, quashed the Writ of Habeas Corpus.

The order quashing the Writ of Habeas Corpus was appealed to the Wisconsin Supreme Court and that order was reversed. The Wisconsin court accordingly ordered the discharge of Isaac Foster from custody.

SUMMARY OF ARGUMENT

I. The decision of the Wisconsin Supreme Court is neither in conflict with the decisions of this Court nor the decisions of the highest Court of the states.

The Wisconsin Supreme Court held that the Governor's warrant was constitutionally insufficient because there was nothing in the papers making up the Indiana requisition to indicate that an Indiana magistrate had made a finding of probable cause against respondent.

A. The procedure followed by the Wisconsin Supreme Court has been sanctioned by this Court.

The Wisconsin Supreme Court did not look behind the Governor's warrant to examine the merits of this case.

The Wisconsin Supreme Court, consistent with the procedure approved by this Court, examined the face of the Governor's warrant and the documents incorporated therein by reference to determine the constitutional sufficiency of those documents.

B. The procedure followed by the Wisconsin Supreme Court is consistent with the practice in the highest Courts of the states, including the Indiana Supreme Court.

Two cases cited by the petitioner indicate that the Indiana Supreme Court has often scrutinized the face of a Governor's warrant in an extradition case to determine its sufficiency.

The highest courts of several states have also reviewed the sufficiency of Governor's warrants in extradition cases.

II. The federal question involved in the case at bar has long been settled by this Court.

The federal question involved herein is simply whether an arrest warrant issued by the Governor must be issued upon probable cause.

The petitioner's position is that while an ordinary arrest warrant must be issued upon probable cause an arrest warrant issued by a Governor need not be issued upon probable cause.

The position assumed by the petitioner flies in the face of the clear language of the Fourth Amendment.

There was nothing in the Governor's warrant or supporting documents thereto supplied by the Indiana authorities to enable the Wisconsin Governor to answer the question, "What makes you think that [Isaac Foster] committed the offense charged?"

ARGUMENT.

I.

THE DECISION OF THE WISCONSIN SUPREME COURT IS NEITHER IN CONFLICT WITH THE DECISIONS OF THIS COURT NOR THE DECISIONS OF THE HIGHEST COURTS OF THE STATES.

It is crystal clear from the opinion of the Wisconsin Supreme Court, (although the petitioner seems to miss the point) exactly what procedure was followed on this habeas corpus proceeding. Respondent sought a writ of habeas corpus from the County Court for Dodge County, Wisconsin, to test the validity of the warrant of the Governor of Wisconsin. The Sheriff of Dodge County filed a return to that writ setting up the Governor's warrant and its supporting documents as justification for holding the petitioner. The County Court quashed the writ of habeas corpus on the basis of this return and petitioner appealed to the Wisconsin Supreme Court.

On appeal the Wisconsin Supreme Court did nothing more than examine the face of the Governor's warrant and supporting documents thereto supplied by the Governor of Indiana to determine the constitutional sufficiency of those documents. See *State ex rel. Foster* v. *Uttech,* 31 Wis. 2d 664, 671, 143 N.W. 2d 500, 503 (1966).

The petitioner's return contained the following documents: the warrant of the Governor of Wisconsin which incorporated a requisition from the Governor of Indiana, an affidavit and warrant charging respondent with robbery in Indiana together with a request for requisition from the

prosecutor of Marion County, Indiana. (R. 6, 6A, 7, 8, 10, 11). On the basis of the documents he received from the Governor of Indiana, the Governor of Wisconsin issued his warrant.

The affidavit charging respondent with robbery was made by an Indiana police officer before a Justice of the Peace in Indiana. The affidavit contains nothing more than the police officer's conclusions. From the face of the affidavit it appears as though the Justice of the Peace did no more than administer an oath to the officer and execute the jurat on the affidavit. The document does not recite that the Justice made a finding of probable cause against the respondent.

The Indiana arrest warrant accompanying the affidavit was issued out of the office of the Clerk of Criminal Court in and for Marion County, Indiana. It was issued by a deputy clerk, not a judicial officer.

After examining these documents, in light of the constitutional requirements for warrants of arrest contained in the Fourth Amendment to the United States Constitution, the Wisconsin Supreme Court concluded that the Governor's warrant was not supported by a finding of probable cause that the respondent committed a crime in the State of Indiana. See *State ex rel. Foster* v. *Uttech*, 31 Wis. 2d 664, 673-674, 143 N.W. 2d 500, 504 (1966). At no time did the Wisconsin Supreme Court go behind the Governor's warrant and supporting documents to inquire into Indiana procedures. The holding of the Court is squarely based on the finding that those documents on their face did not demonstrate that an Indiana magistrate had made a finding of probable cause against the respondent.

A.

The Procedure Followed By The Wisconsin Supreme Court Has Been Sanctioned By This Court.

The Attorney General in his petition for certiorari has completely missed the thrust of the holding of the Wisconsin Supreme Court. The petition urges upon this Court the proposition that the Wisconsin Supreme Court looked behind the documents before it and inquired into the merits of the case. It cites numerous cases standing for the proposition that in an extradition proceeding the courts of the asylum state may not inquire into the merits of the case. That proposition is conceded by the respondent. See *South Carolina* v. *Bailey*, 289 U.S. 412 (1933); *Biddinger* v. *Commissioner of Police*, 245 U.S. 128 (1917); *Drew* v. *Thaw*, 235 U.S. 432 (1914); *Pettibone* v. *Nichols*, 203 U.S. 192 (1906); *Munsey* v. *Clough*, 196 U.S. 364 (1905), all cited by the petitioner. However, that proposition is not material to the issue in dispute in this case.

The sufficiency of the documents presented to the asylum state in an extradition proceeding are subject to the scrutiny of the courts of the asylum state. If those documents on their face do not comply with the Constitution of the United States or with relevant federal or state statutes, the asylum state may properly refuse to extradite. This court in *Appleyard* v. *Massachusetts*, 203 U.S. 222, 228 (1906) long ago commented on the scope of inquiry permissible in the courts of the asylum state in an extradition case:

> "It must appear . . . to the Governor or Chief Magistrate of the State to whom [an extradition] demand is presented, before he can lawfully comply with it, first, that the person demanded is substantially charged

> with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or affidavit, certified as authentic by the Governor of the State making the demand; and, second, that the person demanded is a fugitive from the justice of the state the executive authority of which makes the demand. The first of these prerequisites is the question of law, and is *always opened upon the face of the papers to judicial inquiry,* on an application for discharge under a writ of habeas corpus." (Emphasis added).

The Wisconsin Supreme Court in the case at bar conducted an inquiry into whether the respondent was *substantially* charged with a crime in Indiana. After examining the face of the papers presented by the Indiana authorities, the Wisconsin Court concluded that the respondent was not substantially charged with a crime in Indiana because the papers did not reveal that any magistrate had made a finding of probable cause against him.

When the petitioner argues that the Wisconsin Supreme Court went behind the requisition papers and provided the respondent with a preliminary hearing, he completely misses the point of that court's ruling. The Wisconsin Supreme Court made no attempt to sift the evidence for or against the respondent, but merely observed that the papers supplied by the Indiana authorities did not indicate that any Indiana magistrate had so sifted the evidence. There being no showing of a finding of probable cause against the respondent, the Wisconsin Supreme Court ordered respondent discharged pursuant to the clear mandate of the Fourth Amendment which provides in part that "no Warrant shall issue, but upon probable cause, supported by Oath or affirmation."

B.

The Procedure Followed By The Wisconsin Supreme Court Is Consistent With The Practice In The Highest Courts Of The States, Including The Indiana Supreme Court.

In his petition for certiorari the Attorney General of Wisconsin burdens this Court with cases decided by the Indiana Supreme Court having no bearing on the case at bar. In both *Stanley* v. *Beasley,* 243 Ind. 384, 185 N.E. 2d 731 (1962) and *Johnson* v. *Burke,* 228 Ind. 1, 148 N.E. 2d 413 (1958) the fugitive attempted to resist extradition by raising matters going to the merits of the defense to the crimes charged. The Indiana court properly held that such questions must be raised in the demanding state, not in the asylum state.

The other Indiana cases cited by the Attorney General, *Dawson* v. *Beasley,* 242 Ind. 536, 180 N.E. 2d 367 (1962) and *Turner* v. *O'Neal,* 237 Ind. 258, 145 N.E. 2d 1 (1957) support respondent's position. In both cases the Indiana Supreme Court examined the Governor's warrant and the underlying papers provided by the demanding state. In each case the Indiana court decided that the papers before it were sufficient. These cases, however, are not in conflict with the case at bar since the approach taken by the Indiana Supreme Court in each of them is identical to the approach taken by the Wisconsin Supreme Court.

The procedure followed by the Wisconsin Supreme Court in this case has been followed by the highest courts of states other than Indiana. In *Ex Parte Rubens,* 73 Ariz. 11, 238 P. 2d 402 (1952) the Arizona Supreme Court examined the Governor's warrant and underlying documents supplied by the Governor of California to see whether those papers satisfied the requirements of the state and federal statutes and the United States Constitution. No defect was found and

the fugitive was extradited. A similar approach was followed in *People ex rel. Rukavina* v. *Sain*, 22 Ill. 2d 546, 177 N.E. 2d 110 (1961), *Ex Parte Harck*, 274 S.W. 2d 74 (Tex. Crim. App. 1965), and *Hattaway* v. *Culbreath*, 57 So. 2d 611 (Fla. 1952). In all of those cases the respective courts determined that the Governor's warrant and supporting documents were insufficient to support the extradition of the fugitive at bar.

Because the approach taken by the Wisconsin Supreme Court has long been sanctioned by this Court and practiced by the highest courts of the states, there has been no showing by the petitioner to justify this Court's exercising its discretion to review the case at bar. When properly interpreted, the holding of the Wisconsin Supreme Court does not fall within that class of cases designated as appropriate for review on certiorari in Rule 19.

II.

THE FEDERAL QUESTION INVOLVED IN THE CASE AT BAR HAS LONG BEEN SETTLED BY THIS COURT

The petitioner's position in this case shows a callous disregard for the clear import of the Fourth Amendment. That Amendment provides "no Warrant shall issue, but upon probable cause, supported by Oath or affirmation." It is beyond dispute that this provision is made applicable to state arrest and search warrants by the Fourteenth Amendment due process clause. *Ker* v. *California*, 374 U.S. 23 (1963); *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *State ex rel. White* v. *Simpson*, 28 Wis. 2d 590, 137 N.W. 2d 391 (1965). The position the Attorney General urges upon this Court in his petition is that the Governor's warrant may be issued without a finding of probable cause. Evidently the petitioner takes the position that because §§ 964.03, 964.10 Wis.

Stats. and 18 U. S. C. §3182 do not specifically say that the documents provided by the demanding state to the asylum state must demonstrate on their face a finding of probable cause by a magistrate in the demanding state, the Governor of the asylum state may issue his warrant for the arrest and extradition of the fugitive without being assured that a finding of probable cause has been made. That proposition flies in the face of the clear language of the Fourth Amendment. That proposition means that a Governor's warrant may be issued without a showing of probable cause while an ordinary arrest warrant must be supported by the finding of probable cause. That proposition grafts a double standard on the Fourth Amendment never before countenanced by this Court.

The Attorney General maintains that the Wisconsin Supreme Court misconstrued §§ 964.03, 964.10, Wis. Stats. Not only is that proposition bad law, but it is bad form for the chief law officer of the State of Wisconsin. The fact is the Wisconsin Supreme Court read the Wisconsin statutes in such a way that they conform with the Fourth and Fourteenth Amendments to the United States Constitution. The construction the petitioner contends for would result in those statutes being read in such a way that they would operate unconstitutionally.

The petitioner reads the opinion of the Wisconsin Supreme Court as relying only on *Jaben* v. *United States,* 381 U.S. 214 (1965). That statement reflects a cursory rather than careful reading of the opinion below. The Wisconsin Supreme Court relies primarily on its recent decision in *State ex rel. White* v. *Simpson,* 28 Wis. 2d 590, 137 N.W. 2d 391 (1965) in which it declared unconstitutional the Wisconsin practice whereby arrest warrants were issued by district attorneys. That decision was based upon a long line of

decisions of this Court holding that a warrant for arrest as well as search warrant must be issued by a neutral, detached and impartial magistrate upon a finding of probable cause against the accused. *Jaben* v. *United States,* 381 U.S. 214 (1965); *United States* v. *Ventresca,* 380 U.S. 120 (1965); *Aguilar* v. *Texas,* 378 U.S. 108 (1964); *Giordenello* v. *United States,* 357 U.S. 480 (1958); *Johnson* v. *United States,* 333 U.S. 10 (1948); *Nathanson* v. *United States,* 290 U.S. 41 (1930). All of the decisions of this Court delineating the scope of the Fourth and Fourteenth Amendments were the foundation of *State ex rel. White* v. *Simpson supra.* That foundation was again relied on in the case at bar.

For the Attorney General to dismiss the *Jaben* case because it is a tax case and not an extradition case is a crude example of legal craftsmanship not befitting the highest law officer of the State of Wisconsin. That case and the cases of this Court cited therein stand for the proposition that a warrant must be issued by a neutral, impartial and detached magistrate only upon a finding by that magistrate of probable cause against the accused. The applicability of that proposition to this case seems clear in view of the clear import of the language of the Fourth Amendment. The Wisconsin Supreme Court searched the documents provided in the return of the petitioner to respondent's writ of habeas corpus and could find no indication that probable cause had been found against the respondent. From the face of the documents submitted as the petitioner's return, the Wisconsin Court could find no satisfactory answer to the question, "What makes you think that [Isaac Foster] committed the offense charged?" *Jaben* v. *United States,* 381 U.S. 214, 224 (1965). Hence, the court concluded that the return did not provide sufficient justification for holding the respondent and ordered that the writ of habeas corpus be reinstated.

CONCLUSION

Properly construed the opinion below is completely consistent with the prior decisions of this Court and the highest courts of the several states. The Wisconsin Supreme Court did nothing more than examine the face of the documents making up the petitioner's return to determine their legal sufficiency.

Furthermore, there is no substantial federal question before this Court in the case at bar. Rather, the petition reveals an attempt by the State of Wisconsin to graft a double standard on the Fourth Amendment contrary to the specific language, intent and spirit of that Amendment and of all of the recent cases of this Court dealing with that Amendment.

The petition has made no showing that would justify this Court's exercising its discretion under Rule 19 to review the case at bar on certiorari. Accordingly, the respondent prays that the petition for a writ of certiorari to the Supreme Court of Wisconsin be denied.

Respectfully submitted,

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